

FILED
COURT OF APPEALS
DIVISION II

2014 JAN 23 AM 11:57

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
STATE OF WASHINGTON
BY 8 DEPUTY Respondent,

V.

Sean Forsman

Appellant.

)
)
)
)
)
)
)
)
)
)
)

No. 44801-7-11

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

I, Sean Forsman, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

The Court violated Constitutional due process rights guaranteed in the sixth and fourteenth Amendments, the right to confrontation, by granting City of Lakewood's motion to quash subpoena duces tecum requesting disclosure of public information held in Arrest and Incident Reports maintained and kept by the Lakewood Police Department, of the State's key witness in it's case-in-chief, Lakewood Police Investigator Jeffery Martin, based on the argument that the information does not prove or disprove any element of the crime of issue in the case; see 9-25-12 RP 12.

The ruling was in direct conflict with the criminally accused right to confrontation guaranteed in U.S.C.A Sixth and Fourteenth Amendments, Washington State Constitution Article 1§22 and R.C.W.A 10.52.060 right to confrontation clauses.

Implicit in the right to confrontation of adverse witnesses is a right to conduct a meaningful cross-examination, and the purpose for cross-examination is to show the interests or biases of a witness.

The information sought was relevant (ER 402) evidence of habit and routine (ER 406).

State v. Darden (2002) 145. Wash. 2d 612, 41 P.3d 1189, Where Court limited cross-examination of police officers.

State v. McDaniel, 83 Wa. App. 179, 920 P.2d 1297 (1980), where court held that any limitation on defendants right to present relevant evidence must be justified by a compelling state interest.

Additional Ground 2

The trial court abused its discretion by allowing the State to introduce evidence in the form of testimony by State's witness, Jeffery Martin, about the results of a measuring device in relation to locations of alleged transactions and school bus route stops without any showing of reliability, and authentication, of the device and its operator; see ER 901 (a)(3)(9), 2RP 242-250, which resulted in two mandatory sentence enhancements.

Before the State introduces evidence that will result in a mandatory penalty enhancement the State must show that the

evidence relied upon is accurate; see CrRLJ 613 (b)(1)(2)

State v. Bashaw, 169 WN. 2d 133, 234 P.3d 195 (2010), where the Supreme Court held that court improperly admitted evidence from distance measuring device.

The State failed to make a prima facie showing that measuring device produced accurate results. Therefore, results were improperly admitted in drug prosecution wherein sentence was enhanced, thereby causing an unfair trial.

Additional Ground 3

The prosecutor committed misconduct by improperly bolstering the credibility of the confidential informant who never testified during the trial or provided any written statements when making remarks on facts not admitted in evidence, and for vouching for the credibility of the confidential informant (CI) in closing argument, stating: "She'd risk being arrested, going to jail, going to prison herself, she would risk felony charges herself. A significant risk..."; see 4RP 557-558.

Additionally, in 4RP 592 the prosecutor again attempts to vouch for the credibility of the CI stating: "this informant, there is no evidence that she had ever been subject to a cavity search or a strip search, but she knew those were possibilities. And so because those were a possibility, it eliminated the realistic possibility that she would smuggle drugs to and from these boys."

These statements by the prosecutor in closing argument infringed upon the U.S.C.A. sixth amendment right to confrontation and were improper, and prejudicial remarks.

State v. Coleman, 155 Wash. App. 951, 957, 231 P.3d, where state may not vouch for a government witness' credibility.

State v. Johnson, 80 Wn. App. 337, 908 P.2d 900 (1996), where prosecutors comments in closing argument impermissibly infringed defendant's exercise of Sixth Amendment right to confront witnesses.

Hamdi v. Rumsfield, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2009), where the court held that the defendant must receive a fair opportunity to rebut the governments factual assertions before a neutral decision-maker and that these procedures are essential to a fair trial.

Additional Ground 4

The trial court erroneously instructed the jury that its special finding had to be unanimous in jury instruction #12 for a finding of "no", which was misleading and possibly influential in the imposition of two sentencing firearm enhancement findings.

In State v. Bashaw 169 Wn.2d, the Supreme Court held that a jury instruction to a unanimity requirement for special findings was erroneous, and that that error was not harmless in drug prosecution.

State v. Morgan, 163 Wash.App. 341, 261 P.3d Div. 1 (2011), where the Court held that instruction requiring jury to be unanimous that the State did not prove sentence enhancement of dealing drugs within 1,000 feet of school but route stop, was erroneous.

Additional Ground 5

The trial court relieved the State's burden to prove beyond a reasonable doubt every element of a crime of actual or constructive delivery by providing improper, and erroneous, jury instruction to the definition of delivery in Jury Instruction #7, to which the jury made a finding of guilty on three counts of delivery.

It is the duty of the Court in instructing the jury, in a criminal prosecution, to explain and define the offense or offenses under which one is charged.

In this case, the Court instructed the jury that "Deliver" or "Delivery" means the transfer of a controlled substance from one person to another, when in R.C.W.A. 69.41.010(3) Deliver or Delivery means the "actual, constructive or attempted" transfer from one person to another of a substance, whether or not there is an agency relationship. In R.C.W.A. 69.50.101(2)(f) Deliver or Delivery means the actual, constructive or attempted transfer from one person to another of a substance, whether or not there is an agency relationship. In the Uniformed Controlled Substance Act, Deliver or Delivery means the actual, constructive or attempted transfer from one person to another of a substance, whether or not there is an agency relationship.

The Uniform Controlled Substance Act was drafted to achieve uniformity between the laws of the several States and those of the Federal Government.

In W.P.I.C. 50.07 Deliver Definition For Jury Instruction, "Deliver or Delivery means the [actual], or [constructive], or [attempted] transfer of a controlled substance from one person

to another."

State v. Martinez, 123 Wash.App. 841, 846-47, 99 P.3d 418 (2004), where parties are entitled to jury instruction that accurately states the law.

State v. Brown, 147 Wn. 2d 330, 58 P.3d 889 (2002), where the court held that an erroneous instruction is harmless if the error does not relieve the prosecution of its burden to prove each element of a crime beyond a reasonable doubt.

Therefore, a jury instruction that relieves the state of its burden to prove every element of a crime beyond reasonable doubt requires automatic reversal.

Additional Ground 6

Prosecutors closing argument in rebuttal was flagrant misconduct when directing the jury to return a verdict of guilty if they did not think that the defendant was a victim of a frame job, if they did not think that the police lied, and if they did not think that what the defendant said on the stand was the truth, thus impermissibly shifting the State's burden of proving each element of the offenses beyond a reasonable doubt to a burden on the defense; see 4 RP 594.

Washington Criminal Practice and Procedure, Chapter 3, subsection 303.5, entitled "Presumption of Innocence", states that "the prosecution must prove guilt beyond a reasonable doubt", and that "there is to be no inference against the defendant because of arrest, indictment, or presence as a defendant in court."

In Re: Winship 397 U.S. 358 1970, where Due Process requires

the prosecutor to prove every element of a crime beyond a reasonable doubt.

See also *County of Ulster v. Allen*, 442 U.S. 140 (1979); *Sandstrom v. Montana*, 442 U.S. 510 (1979); and *Francis v. Franklin*, 471 U.S. 307 (1985).

As a result of these decisions, it is clear that it is never permissible to shift to the defendant the burden of persuasion to disprove an element of a crime charged by means of a presumption. Additionally, a conclusive or irrebuttable presumption operating against the criminal defendant is also unconstitutional.

The jury was unfairly influenced by prosecutors closing arguments during rebuttal which improperly shifted the State's burden of proving each element of its case beyond a reasonable doubt.

State v. Wright, 76 Wash.App 811, 888 P.2d 1214 (1995), where the court held that it is misconduct for the prosecutor to argue that in order to believe defendant, jury must find that states witnesses are lying.

Additional Ground 7

The trial court erred and abused its discretion by denying defenses motion to dismiss the case based on the evidence that was presented before the court that the case could not be proven beyond a reasonable doubt, see 4 RP 550, based on the assertion that the evidence was sufficient to go to the jury.

State v. Hernandez, 85 Wn.App. 672, 935 P.2d 623 (1997), where the court held that there is sufficient evidence of a

delivery of a controlled substance if police observe the defendant deliver a substance, arrest him thereafter, and find similar packages of a controlled substance in his possession.

The statements made by the prosecutor during closing arguments state clearly that the prosecution did not, in fact, prove the State's case beyond a reasonable doubt against the defendant; see 4 RP 571.

In Re: Winship 397 U.S. 358 (1970), where due process requires the prosecutor to prove every element of a crime beyond a reasonable doubt.

United States v. Ulano, 507 U.S. 725 (1993), where the court held that where there is plain error that seriously effects the fairness, integrity, or public reputation of judicial proceedings, relief should be granted. Adickes v. S.H. Kresse & Co., 398 U.S. 144 S.Ct. 1598 (1970), where doctrine of precedence dictates that the court must follow earlier judicial decisions when same points arise again.

Conclusion

The appellant seeks reversal or a new trial based on the aforementioned additional grounds, or whatever relief the Court deems necessary.

Dated this 19th day of January, 2014


Sean Forsman

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

V.

Sean Forsman

Appellant.

No. 44801-7-11

CORRECTIONS TO STATEMENT
OF ADDITIONAL GROUNDS
FOR REVIEW

Appellant, Sean Forsman, hereby submits the following corrections that are to replace and supersede the relevant parts in the Statement of Additional Grounds filed with this Court.

In **Additional Ground 4**, ¶ 1, it states, in part: "the imposition of two sentencing firearm enhancement findings..." That line should state, and is to be replaced with, the following: "the imposition of two protected school zone enhancement findings."

Additionally, in **Additional Ground 4**, at the end of ¶ 3, the statement "school but route stop," should state, and is to be replaced with, the following: "school bus route stop."

Submitted this 27th day of January, 2014.

Sean Forsman
Sean Forsman

FILED
COURT OF APPEALS
DIVISION II
2014 JAN 31 AM 11:28
STATE OF WASHINGTON
DEPUTY